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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 230.

PETER J. CARPENTER, Petitioner,

vs.

WABASH RAILWAY COMPANY, FRANK C. NICODEMUS, JR., NORMAN B. PITCAIRN, Receivers of the Wabash Railway Company, CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, THE CENTRAL HANOVER BANK & TRUST COMPANY, as Trustee, and T. J. MOSS TIE COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF AND ARGUMENT OF PETER J. CARPENTER, PETITIONER.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF AND ARGUMENT OF PETER J. CARPENTER, PETITIONER.

PART ONE.

A REPLY TO THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, AS TRUSTEE (HEREINAFTER CALLED "THE CHASE NATIONAL BANK").

I.

To the argument of The Chase National Bank that Section 77 (n) of the Bankruptcy Act, as amended by the Act of August 11, 1939 (Pub. 386, Chap. 689, 76th

Congress, 1st Session), does not provide for an extension of "the time for filing" claims of railway employes for personal injuries, and does not provide that claims barred by the Statute of Limitations "or by other applicable limitations on the time for filing claims" shall nevertheless be paid, it is, we respectfully submit, sufficient answer, that:

(A) It is not disputable that *within the time fixed by the District Court for the filing of claims, the petitioner filed with the Special Master his claim on the judgment which he had recovered* against Wabash Railway Company, which judgment was then pending on appeal in the Supreme Court of Missouri (R. 23-24, 60, 115).

(B) The Chase National Bank does not cite any statutory bar or limitation of petitioner's claim (and in fact there is none).

II.

While the respondent The Chase National Bank contends to the contrary, we respectfully submit that said Section 77 (n), as amended by the Act of August 11, 1939, does not vest in the District Court a discretion as to whether an injured employe will be permitted to apply for, and receive, the preferential payment of his claim in accordance with the provisions of such statute. The language of the statute is unmistakable and mandatory. It provides without equivocation or exception that:

"* * * In equity receiverships of railroad corporations NOW or hereafter pending in any court of the United States, claims for personal injuries to employes of a railroad corporation, * * * SHALL be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad."

The District Court found, and therefore judicially knows,

that petitione 's claim is for personal injuries sustained in the course of his employment as an employe of Wabash Railway Company (R. 78). The equity receivership of Wabash Railway Company is "*now pending*" in said District Court. These facts are beyond controversy. Such being the case, and independent of every other consideration, the statute, in its present form, *commands* the preferential payment of petitioner's claim.

III.

In its brief filed in opposition to petitioner's petition for writ of certiorari, respondent The Chase National Bank urged that the petitioner's rights, and the rights of other creditors, were fixed as of the date when the Receivers of the Wabash Railroad Company were appointed, and that said Section 77 (n) of the Bankruptcy Act, as amended by the Act of August 11, 1939, cannot be made applicable to petitioner's claim because the appointment of the Receivers for the Wabash Railway Company antedated the Act of August 11, 1939. While such contention is not advanced in the brief filed by respondent The Chase National Bank since the issuance of the writ of certiorari, and has possibly been abandoned, nevertheless petitioner, because of his understanding that the Court may refer to all briefs filed in its consideration of this cause, will answer such contention.

We well recognize that it is a general rule of equity that the rights of creditors in a receivership proceeding are fixed as of the date of the appointment of the Receiver. That rule, however, not only has its exceptions, but it is a rule of law in which persons have no vested right, so it may be changed by appropriate legislation. In this connection, in Thompson v. Siratt (C. C. A. 8), 95 Fed. (2d) 214, 217, it was appropriately said:

"No person has a vested interest in any rule of

law entitling him to insist that it shall remain unchanged for his benefit. Munn v. Illinois, 94 U. S. 113, 134, 24 L. Ed. 77; New York Central R. Co. v. White, 243 U. S. 188, 198, 37 S. Ct. 247, 61 L. Ed. 667, L. R. A. 1917 D 1, Ann. Cas. 1917 D 629."

And, further (l. c. 218):

"The legislation being a proper exercise of the bankruptcy power, there is no merit in the objection that it affects obligations incurred before its enactment. Canada Southern Ry. Co. v. Gebhard, 109 U. S. 527, 539, 3 S. Ct. 363, 27 L. Ed. 1020; Continental Illinois Nat. Bank v. Chicago, Rock Island & P. Ry. Co., 294 U. S. 648, 674, 55 S. Ct. 595, 605, 79 L. Ed. 1110; United States Nat. Bank v. Pamp (8 Cir.), 77 F. (2d) 9, 99 A. L. R. 1370; Campbell v. Allegheny Corp. (4 Cir.), 75 F. (2d) 947."

It has long been established that the rights of creditors, whether lien claimants or general creditors, are subject to the implied condition of prior payment of current expenses classified as operating expenses (Fosdick v. Schall, 99 U. S. 235, 252; Hale v. Frost, 99 U. S. 389, 391-392; Burnham v. Bowen, 111 U. S. 776, 780; Miltenberger v. Logansport R. Co., 106 U. S. 286, 311; Union Trust Company v. Morrison, 125 U. S. 591), so that a reasonable legislative classification of certain expenses as coming within the class of operating expenses may be made retroactive without in any manner impairing the rights of such lien claimants or general creditors. This is fully demonstrated by the decisions in Wise v. Chicago, R. I. & P. R. Co. (C. C. A. 7), 90 F. (2d) 312, cert. den. 302 U. S. 717; Central Hanover Bank & Trust Co. v. Williams (C. C. A. 8), 95 F. (2d) 210, and Thompson v. Siratt (C. C. A. 8), 95 F. (2d) 214, all of which upheld section 77 (n) as it existed prior to the amendment of August 11, 1939, which had the effect of retroactively classifying as preferred and

payable as operating expenses such claims as that of petitioner here. Note the chronological data in those cases, as follows:

	Wise (nonemploye) 90 F. (2d) 312	Williams (employe) 95 F. (2d) 210	Siratt (employe) 95 F. (2d) 214
Date of injury	Jan. 2, 1926	Aug. 31, 1930	Feb. 18, 1931
Date of original judgment	Nov. 13, 1931	May 24, 1932	Apr. 20, 1934
Date of final judgment	Nov. 16, 1934	Nov. 5, 1935	July 2, 1935
Date of appointment of receivers		Nov. 1, 1932	
Date of appointment of trustees under Sec. 77 of Bankruptcy Act	June 7, 1933	May, 1933	June 22, 1933
Date of legislation classifying claim as operating expense	Aug. 27, 1935	Mar. 3, 1933, as amended Aug. 27, 1935	Mar. 3, 1933, as amended Aug. 27, 1935

Prior to the amendment of August 11, 1939, the decision in the instant case in the Circuit Court of Appeals had been rendered (103 Fed. [2d] 996; R. 113-123), denying preference, such as had been given in the Wise, Williams and Siratt cases, supra, to a claim of an employe where the employer railroad was in equity receivership as distinguished from bankruptcy under Section 77 of the Bankruptcy Act.

The Congress is presumed to have known of these judicial determinations when it amended Section 77 (n) of the Bankruptcy Act by the Act of August 11, 1939, and so it conclusively appears that the Congress intended this amendment to have the same effect in equity receiverships as in reorganization proceedings under said section 77, in so far as the status of employes' claims is concerned. This is manifest from the report of the Judiciary Committee, reporting the Act of August 11, 1939 (then Senate Bill No. 2654 of the 76th Congress, First Session) favorably to the House of Representatives, for in that report,

dated August 4, 1939, Report No. 1458, First Session of the 76th Congress, the House Judiciary Committee said:

> "The purpose of the amendment, as it clearly appears, is to place injured employees and representatives of deceased employees, who have claims against railroads in equity receivership in the same position as persons of the same class who have claims against roads in trusteeship under section 77. Under the present law, the persons above designated who have judgments against roads in receivership for injuries received prior to receivership are classed as general creditors whereas judgments of such persons against roads in trusteeship are paid as operating expenses.
>
> "There is manifestly no sound reason for the existing discrimination. Both classes of claims, or, rather, the same kind of claims, should be given the same status. All alike grew out of the actual operation of the railroads, and all alike should be paid as operating expenses.
>
> "The bill is endorsed by the Railway Labor Executives' Association representing twenty of the standard railroad labor organizations, in the following language:
>
> " 'We urge that this bill be enacted at this session so that injured employees and representatives of deceased employees holding claims and judgments against roads in receivership may, without delay, be placed in the same position as employees and representatives of deceased employees who have claims and judgments against roads under trusteeship. All alike were injured while operating roads and all alike should be compensated out of operating expenses.' "

From the foregoing it clearly appears that the Congress intended the Act of August 11, 1939, to be applicable to claims such as that of the petitioner here, and to such intendment of Congress, we respectfully submit, the courts should give due effect.

Since the enactment of the Act of August 11, 1939, and subsequent to the decision of the instant case by the Cir-

cuit Court of Appeals for the Eighth Circuit, that same Circuit Court of Appeals has had occasion to construe and apply the Act of August 11, 1939, in the case of American Surety Company of New York v. Wabash R. Co. et al., No. 11,211 of that court, decided November 21, 1939, and not yet reported. In that case, American Surety Company of New York was assignee of a judgment which, prior to the receivership of the Wabash Railway Company, one Thomas P. Conroy had recovered against it on account of injuries sustained by him in the course of his employment as an employe of Wabash Railway Company, and from which judgment an appeal was pending at the time of the appointment of Receivers for the Wabash Railway Company. Conroy's said judgment having thereafter been affirmed, the American Surety Company of New York, which had executed the appeal bond as surety for Wabash Railway Company, paid Conroy his judgment, and took an assignment of it from him. The American Surety Company intervened in the Wabash Railway Company receivership proceeding, praying allowance of the amount of the Conroy judgment, as a preferred claim immediately payable by the Receivers. The District Court entered an order allowing the amount of the Conroy judgment as a general claim, and denying all preference, from which order the American Surety Company appealed. The Circuit Court of Appeals for the Eighth Circuit held that the American Surety Company, as assignee of the Conroy personal injury judgment, was entitled to have its claim preferred and payable as an operating expense under and by virtue of the Act of August 11, 1939, and in so holding said, in part:

> "Since submission of this appeal, the Act of August 11, 1939 (Pub. 386, Chap. 689, 76th Cong., 1st Session), amending subsection (n) of Section 77 of the Bankruptcy Act, as amended, has come into effect. (2) This Act has been brought to our attention and briefs have

been submitted as to the effect thereof upon this appeal.

"Appellant contends that it is entitled to the relief accorded by the above-amended subsection either because it is a surety upon a supersedeas bond in a personal injury suit or because it is the assignee of the personal injury judgment. We express no opinion upon the rights of appellant based upon its position as a surety on the supersedeas bond. We think the contention is sound as based upon its status as assignee of the judgment. This being our view, it is necessary to examine only such contentions of appellees as bear upon the rights of appellant as such assignee. • • •

"This is a highly remedial act. The rule of construction here applicable is that remedial acts are to be liberally construed to carry out the remedial purpose thereof. The purpose of this act is to secure relief for injured employees of railroads which have gone into bankruptcy or receivership after the injury and before satisfaction of the claim therefor against the railroad. • • •

"Appellee, Chase National Bank of the City of New York, contends that this act does not apply to personal injury claims which had been paid before the act became effective, because the rights of the parties were fixed theretofore—those of Conroy when the Receivers were appointed and those of appellant when the judgment was assigned. The argument and citations are really confined to the effect of the receivership upon the claim of Conroy. Reliance is placed upon the familiar rule that a receiver takes and holds the property subject only to such liens and equities as existed at the time of receivership. The citations (*Illinois Central Railroad Co. v. U. S. Fidelity & Guaranty Co.*, 87 Fed. [2d] 121, 123, C. C. A. 5; *In re K-T Sandwich Shoppe of Akron*, 34 Fed. [2d] 962, 963, N. D. Ohio) are to that effect. We have no quarrel with that rule but think it inapplicable. A long-established rule has been that certain labor and material claims arising before receivership have an

equity to be paid as operating expenses during receivership (*Fosdick v. Schall*, 99 U. S. 235). This is a judicially declared rule. What the courts could declare, obviously, the Congress could require. Heretofore, the courts have consistently decided that personal injury claims, arising in course of the operation of the railroad—even to employees—were without the rule. The reasons why the Congress could include injuries of employees is well stated for this Court by Judge Woodrough in *Central Hanover Bank v. Williams*, 95 Fed. (2d) 210, 212. Indeed, that case governs this point here. That case was upon subsection (n) as amended by the Act of August 27, 1935 (49 Stat. 911, 923), which provided that such personal injury claims to employees should be treated as payable as operating expenses in reorganization proceedings under Section 77 of the Bankruptcy Act. Clearly, the reasoning of that opinion is, since the further amendment by the Act of August 11, 1939, equally applicable to such claims in an equity receivership of a railroad.

"The order is reversed with instructions to allow the claim payable as an operating expense by the Receivers."

The foregoing decisions clearly illustrate that the rights of petitioner, with respect to the classification and payment of his claim, were not unalterably fixed as of the date of the appointment of receivers for the Wabash Railway Company, for those decisions, dealing with Section 77 (n) of the Bankruptcy Act, as it existed both before and after its amendment by the Act of August 11, 1939, permitted classification of claims thereunder, notwithstanding such claims may have arisen prior to the enactment of section 77 (n). Thus, we most respectfully submit, the appointment of receivers for the Wabash Railway Company prior to the Amendatory Act of August 11, 1939, does not preclude the petitioner from the benefits of such amendatory act.

PART TWO.

A REPLY TO CENTRAL HANOVER BANK & TRUST COMPANY, AS TRUSTEE.

I.

The contention of respondent Central Hanover Bank & Trust Company, as Trustee, that the record fails to show the date of the respective mortgages on the property of Wabash Railway Company, and that no ruling which might affect the rights of the mortgagees should be made in the absence of a record showing of all of the facts pertaining to such mortgages, is wholly immaterial. This, for the reason that said section 77 (n), as amended by the Act of August 11, 1939, commands, without any exception whatsoever, that claims such as that of petitioner shall be preferred and paid as operating expenses. Accordingly, the only facts necessary to a determination of petitioner's right to such preference and payment are (a) whether his claim is that of an injured employe of Wabash Railway Company, for injuries sustained by him as such employe, and (b) whether the equity receivership of Wabash Railway Company is "now pending" in a "court of the United States."

Respondent Central Hanover Bank & Trust Company, in connection with its contention that the present record is not sufficient for the determination of questions suggested by said respondent, states (without any citation of authorities or demonstration of particulars) that there remains for decision the question of whether the Amendment of August 11, 1939, "does not conflict with the due process clause of the Fifth Amendment to the Constitution of the United States, as applied to the particular facts in this case." The record shows that the mortgages, in which the respondent trustees are interested, antedate the claim

of petitioner (R. 37, 40), and, therefore, the record fully presents the fact that the Act of August 11, 1939, if applied to petitioner's claim, gives to petitioner's claim a priority, notwithstanding the prior existence of such mortgages.

The constitutionality of Section 77 (n) of the Bankruptcy Act, as it existed before the Amendment of August 11, 1939, as well as thereafter, has been held in a number of reported decisions. In American Surety Company of New York v. Wabash Railway Company, supra, the Circuit Court of Appeals for the Eighth Circuit said:

> "The receivers argue that the District Court had no jurisdiction because this is an equity receivership and this Act is an amendment to the Bankruptcy Act. It is true that the jurisdiction of a District Court, acting in bankruptcy, is different and distinct from its jurisdiction in equity (*Hanna v. Brietson Mfg. Co.*, 62 Fed. [2d] 145; *Naylor v. Cantley*, 96 Fed. [2d] 761, 763, both in this court). However, there can be no doubt that this Act, while an amendment to the Bankruptcy Act, expressly applies to 'equity receiverships of railroad corporation.' We are not aware of any constitutional inhibition on Congress which would prevent it including such a provision in legislation amending the Bankruptcy Act."

In Wise v. Chicago, R. I. & P. R. Co. (C. C. A. 7), 90 Fed. (2d) 312, cert. den. 302 U. S. 717, there was directly involved the question of whether the classification of certain claims, payable by sureties, under section 77 (n) as it existed prior to the amendment of August 11, 1939, impaired vested mortgage rights or deprived mortgagees of their property without due process of law, in violation of the Fifth Amendment, or was unreasonable or arbitrary. The Circuit Court of Appeals for the Seventh Circuit, upon the authority of numerous previous decisions of this

Honorable Court, clearly and unequivocally ruled that the act in question did not violate the Fifth Amendment, did not divest mortgage or other rights, and did not arbitrarily or unreasonably classify such claims as operating expenses. In connection with whether the classification of these claims was arbitrary or unreasonable, the Court said, in part (90 Fed. [2d], l. c. 316):

> "Classification of claims as proper to be paid as current expenses from current income under the decisions cited is based, not upon the Bankruptcy Act, but upon the inherent rules of equity. Congress made no provision for the allowance of priority of current expenses in equity cases, but the Supreme Court found that equity itself demands such classification. * * * Obviously Congress, under its paramount jurisdiction in bankruptcy, may establish reasonable standards of provability and measures of allowance in order to work out equitable distribution of assets. * * * Congress may not arbitrarily classify an act as something, the attributes of which it does not partake, Heiner v. Donnan, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772, but it may always designate an act as coming within a certain category if in its inherent nature it may reasonably be said to be endowed with the qualities of such category. * * * Human care and judgment have never been able to eliminate accidents and consequent hurts to persons and property in such a hazardous business as that of operating a railroad. Injuries to the public through negligence are unfortunately far from infrequent; overflow of land because of embankments and levees occurs from time to time. In the very nature of things these risks and events attach to, emanate from and grow out of the process of earning income. They partake of the nature of operating expenses, and, therefore, may be classified by Congress as such expenses, payment of which from the income before payment to the mortgagee is only equitable. * * * The question of unreasonable and arbitrary classification is one aris-

ing upon the specific facts before us, which disclose that the debts to appellants originally were incurred in the earning of the income upon which the mortgagee claims a lien. Having been incurred in the process of earning the income, they partake of the nature of operating expenses and are not unreasonably classified as such."

Following the decision in the Wise case, supra, the Circuit Court of Appeals for the Eighth Circuit, in Central Hanover Bank & Trust Company v. Williams (C. C. A. 8), 95 Fed. (2d) 210, had before it the same section of the Bankruptcy Act in a case involving a claim for injuries to an employe of a railroad. It was there ruled that the District Court had properly allowed the claim as preferred and payable out of the operating revenues of the railroad in reorganization, the Court saying, in part (95 Fed. [2d], l. c. 210):

"The decisions demonstrate the necessity of allowing some preference in any liquidation and preclude any holding that preferences are generally or necessarily an unconstitutional taking of the property of the paramount lienors without due process. The line of adjudication constitutes recognition by the courts that Congress, when it made provision for uniform proceedings in bankruptcy reorganization, had the power to make classification among creditors, and it leaves the burden upon the bondholders here to demonstrate that the classification they complain of is arbitrary. * * * But we think it cannot be shown that the mere extension of preferences here complained of, which Congress has made beyond but in close analogy to those heretofore allowed of necessity by the courts, constitutes an arbitrary or confiscatory classification. The classification appears to have been made in the field where classification was necessary and well within the legislative powers. In re Chicago, R. I. & P. Railway Co., 7 Cir., 90 Fed. (2d) 312, 113, A. L. R. 487."

Again, the same result was reached by the same Court in the case of Thompson v. Siratt (C. C. A. 8), 95 Fed. (2d) 214, which also involved a claim for injuries to an employe of the railroad. Among other things, it was there said (95 Fed. [2d], l. c. 217-218):

> "In view of the Supreme Court's approval of the Six Months Rule in equity receivership cases, it cannot be denied that it is entirely proper for Congress to determine that some operating expenses be given a preference over mortgage debts. • • • In the enactment of Section 77 (n) Congress evidently considered that the extension of the term 'operating expenses' to include claims for personal injuries to employes is in the interest of the public, and that it is necessary and advantageous to a successful reorganization. It is a part of the legislative function to fix standards and establish limitations in bankruptcy, and when so determined they are not ordinarily subject to re-examination in the courts. • • • The fact that the definition and classification of 'operating expenses' adopted in the act is different from the definition worked out by the courts of equity does not condemn the inclusion of such claims, unless to do so is so arbitrary and unreasonable as to offend the due process clause of the Fifth Amendment. • • • Claims for personal injuries to employes bear a direct relationship to the operation of a railroad. They arise usually either out of its operation by means of which its income is produced or out of the preservation or repair of the property covered by the mortgagee's lien. In either case both the bondholder and the public are benefited by the service in which the injury occurred. Under the equity rule the cost of repairing broken or damaged equipment is allowed a preference. Under these circumstances it cannot be said that Congress was unreasonable in classifying as an operating expense the claims of employes injured in the performance of their duties as such employes. On principle such claims are not different from claims

for repairs. * * * Legislation recognizing that claims for personal injuries to employes are costs necessarily incident to the operation of railroads, and making special provisions for the payment of that cost, has been approved by the Supreme Court as not repugnant to the Fifth Amendment. Second Employes' Liability Cases, 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. * * * And we cannot say that the classification of claims for personal injuries to employes as preferred under subsection 77 (n) is so unreasonable and arbitrary as to violate the Fifth Amendment."

The decisions in Wise v. Chicago, R. I. & P. R. Co. (C. C. A. 7), 90 F. (2d) 312, certiorari denied 302 U. S. 717, 58 S. Ct. 37, 82 L. Ed. 554; Central-Hanover Bank & Trust Co. v. Williams (C. C. A. 8), 95 F. (2d) 210, and Thompson v. Siratt (C. C. A. 8), 95 F. (2d) 214, holding, as they authoritatively do, that Section 77 (n) of the Bankruptcy Act [11 U. S. C. A. § 205 (n)] did not violate the Fifth Amendment to the Constitution, prior to its amendment by the Act of August 11, 1939, how can it be said that the Amendatory Act of August 11, 1939, which did no more than extend the application of said section 77 (n) to equity receiverships, could be violative of the Fifth Amendment? If section 77 (n) did not deprive persons of their property without due process of law in a statutory reorganization proceeding, how could it do so in an equity receivership reorganization proceeding? These questions answer themselves, and conclusively demonstrate that the Act of August 11, 1939, as made applicable to equity receiverships, is in harmony with the Fifth Amendment.

II.

It is contended by respondent Central Hanover Bank & Trust Company that the petition, which petitioner sought

to file in the Wabash receivership proceeding below, did not pray that his claim be accorded priority, and that, therefore, he is not entitled to intervene in such proceeding for the purpose of asserting the priority of his claim. The said petition, however, does assert, together with the grounds therefor in detail, that petitioner was entitled to have his claim preferred and paid as an operating expense, and said petition clearly shows that the primary and ultimate purpose thereof was to establish a means for the enforcement of the preferential character of his claim.

It is firmly established that a bill in equity will not be dismissed if, upon its face, there is presented a cause for any relief (Kansas v. Colorado, 185 U. S. 125, 145; Geiger v. First-Troy Nat'l Bank & Trust Co. [C. C. A. 6], 30 Fed. [2d] 7, 9; Reconstruction Finance Corp. v. Central Rep. Trust Co. [D. C. Ill.], 11 Fed. Supp. 976, 979). We respectfully submit that, by the same token, if a petition for leave to intervene discloses *any* right which the petitioner is entitled to protect by means of intervention, his petition should not be denied merely because it does not pray for the specific relief to which his petition shows he is entitled. Moreover, in determining petitioner's application for leave to file his said petition, and as clearly appears in their respective opinions, the courts below treated as paramount and controlling the question of whether petitioner is entitled to have his claim preferred and paid as an operating expense. In addition to this, the Act of August 11, 1939, having been enacted since the filing of petitioner's application for leave to file his petition in the District Court, the Act of August 11, 1939, should be treated and considered as a part of petitioner's said petition, and petitioner's said petition should be construed and given effect in the light of the Act of August 11, 1939.

PART THREE.

A REPLY TO RESPONDENTS WABASH RAILWAY COMPANY AND ITS RECEIVERS.

The respondents Wabash Railway Company and its Receivers contend that petitioner has no right to intervene because the rights of petitioner, in the equity receivership proceeding, were protected and safeguarded by representation by parties to that proceeding, and by the order appointing the Special Master therein. In making this contention these respondents rely upon a further contention that the Act of August 11, 1939, amending Subsection (n) of Section 77 of the Bankruptcy Act, cannot be applied or considered in this connection.

As we understand the order issuing the writ of certiorari in this proceeding, that order permits consideration of the Act of August 11, 1939, in determining "the question of the right of the petitioner to intervene in order to assert priority," and we believe that we have established (Point I of Petitioner's Original Brief, pp. 14-16) that the Act of August 11, 1939, should here be considered by this Honorable Court to the end that this case be determined by the law as it now exists. It is obvious—and practically conceded by the argument made by respondents Wabash Railway Company and its Receivers—that, if the rights of plaintiff under the Act of August 11, 1939, are to be considered in determining the right of petitioner to intervene to assert priority, these rights are not protected and safeguarded either by representation or by the order appointing the Special Master, for at least three reasons, viz.: (1) there is no showing that any party to the equity receivership proceeding stands in the position of a representative of injured or deceased employes, or in the position of representing a class of persons entitled to such preferences as are granted by the Act of August 11, 1939, to injured em-

ployes or the representatives of deceased employes; (2) the Special Master having determined and reported on petitioner's claim long prior to the passage of the Act of August 11, 1939, could not have determined, protected and safeguarded petitioner's rights thereunder; and (3) the Special Master, having classified petitioner's claim as a general unsecured claim, in fact deprived petitioner of the preferences to which he is entitled under the Act of August 11, 1939.

CONCLUSION.

The contention of respondent The Chase National Bank, to the effect that it is debatable and within the discretion of the court in which the Wabash Railway Company receivership is pending as to whether petitioner may be permitted even to file a petition for the preferential payment of his claim under the provisions of the Act of August 11, 1939, and the obvious inference that said respondent will, for the reasons assigned in its brief, oppose the filing by petitioner of any such petition in such court, not only is in conflict with the statement of respondent Central Hanover Bank & Trust Company to the effect that petitioner's rights, "if any, under the amended section, can be fully asserted in the receivership proceedings," but presages still further and tedious litigation for petitioner to obtain even a hearing of his claim for priority, unless this Honorable Court shall here and now settle his right to assert, and obtain his right to, the preferential payment of his claim.

We most respectfully submit that, for the reasons and upon the authorities relied on by petitioner herein, this case is one calling for the reversal of the judgments below, and the making of such orders by this Honorable Court as may be necessary and appropriate to the end that peti-

tioner's said judgment and claim be preferred and paid out of the assets of Wabash Railway Company "as an operating expense of such railroad."

Respectfully submitted,

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